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Environmental Plaintiff Standing and Extraterritoriality in The Endangered Species Act: *Lujan v. Defenders of Wildlife*

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Environmental Plaintiff Standing and Extraterritoriality in The Endangered Species Act: *Lujan v. Defenders of Wildlife**

INTRODUCTION

Motivated by a concern for accelerated species extinction around the world, Congress passed the Endangered Species Act of 1973 (ESA)[1], its express purpose being the preservation and protection of endangered species.[2] One of the most crucial and controversial provisions of the ESA is section 7, which declares the intention of Congress to protect "any" endangered and threatened species against "any action" taken by "any" federal agency.[3] Section 7 of the Act requires each federal agency to consult with the Secretary of the Department of the Interior to ensure that any agency action is unlikely to jeopardize endangered species.[4] An important question is thus raised concerning

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* Subsequent to the finalization of this issue, the Supreme Court reversed the Eighth Circuit's decision in this case. *Lujan v. Defenders of Wildlife*, 60 U.S.L.W. 4495 (U.S. June 12, 1992) (No. 90-1424). The Court held Defenders lacked standing because they failed to demonstrate an injury in fact. Thus the Court of Appeals erred in denying summary judgment for the United States Government.

[1] Endangered Species Act of 1973 [hereinafter cited as ESA], *as amended*, 16 U.S.C. §§ 1531-1543 (1988).

[2] Henry J. Blum, Note, *The Extraterritorial Application of Section 7 of the Endangered Species Act*, 13 COLUM. J. ENVTL. L. 129, 129 n.4 (1987) [hereinafter Blum Note] (citing S. REP. No. 307, 93d Cong., 1st Sess. 1, *reprinted in* 1973 U.S.C.A.A.N. 2989).

[3] 16 U.S.C. § 1536(a)(2) (*as amended*, 1988) (as *cited in* John C. Beiers, Comment, *The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 SANTA CLARA L. REV. 171, 176 n.23 and accompanying text (1989)).

[4] Section 7 (a)(2) provides:

> Each Federal agency shall, *in consultation with* and with the assistance of the Secretary, insure that *any action* authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of *any* endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . .

Endangered Species Act § 7(a)(2), 16 U.S.C. §§ 1536(a)(2) (1988) (emphasis added).

the scope of section 7 of the Act itself: Do the requirements for consultation apply to federal agency actions taken in foreign countries?[5]

In 1978, the Secretary of the Interior interpreted section 7 as having extraterritorial application and as requiring agencies to consult with the Secretary concerning actions in foreign countries concerning their actions.[6] In 1986 the Secretary attempted to eliminate this extraterritorial interpretation by revising the rule to limit the consultation requirement to agency actions in the United States or on the high seas.[7]

The validity of the 1986 regulation has been directly challenged and has made its way to the Supreme Court in *Lujan v. Defenders of Wildlife*.[8] This comment tracks the progress of the *Defenders* case and examines the two issues it brings before the Supreme Court: 1) Do the plaintiffs have standing to challenge the regulation issued by the Secretary of the Interior which interprets the statutory obligations of federal agencies under Section 7(a)(2), when they have not challenged any specific action by an agency upon which the statutory obligations actually fall?; and 2) Is the Secretary's construction of Section 7(a)(2) of the ESA as being inapplicable to federal agencies' activities in foreign countries consistent with the Act?[9]

I. *LUJAN V. DEFENDERS OF WILDLIFE*

Defenders of Wildlife, Friends of Animals and Their Environment and the Humane Society of the United States (Defend-

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[5] John C. Beiers, Comment, *supra* note 3, 29 SANTA CLARA L. REV. 171, 176 (1989).

[6] The 1978 regulation provides:

> Section 7 applies to all listed species of fish, wildlife, or plants . . . [and] requires every Federal agency to insure that its activities and programs in the United States, upon the high seas, *and in foreign countries* will not jeopardize the continued existence of a listed species.

50 C.F.R. § 402.04 (1978) (emphasis added).

[7] The 1986 regulation provides:

> Section 7(a)(2) of the Act requires every Federal agency, in consultaion with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species.

50 C.F.R. § 402.01(a) (1987).

[8] Defenders of Wildlife v. Hodel, 658 F.Supp. 43, (D. Minn. 1987), *rev'd*, 851 F.2d 1035 (8th Cir. 1988), *on remand*, 707 F.Supp. 1082 (D. Minn. 1989), *aff'd*, 911 F.2d 117 (8th Cir. 1990), *cert. granted sub nom*, Lujan v. Defenders of Wildlife, ___ U.S. ___, 111 S.Ct. 2008, 59 U.S.L.W. 3763 (U.S. May 14, 1991) (No. 90-1424).

[9] Lujan v. Defenders of Wildlife, 59 U.S.L.W. 3763, 3763-64 (U.S. May 14, 1991), *granting review*, 911 F.2d 117 (8th Cir. 1990).

ers) first brought their action in district court challenging the Secretary of the Interior's 1986 regulation as invalid on its face and contrary to the provisions of the ESA.[10] The failure of the regulation to require consultation on foreign federal agency action, as alleged by Defenders, increases the rate of extinction of endangered species in foreign countries.[11] Defenders asserted the new regulation threatens, imminently and irreparably, its and the public's interest in the continued application of section 7 and related sections[12] of the Act to agency action abroad.[13] According to Defenders, the Secretary violated a statutory duty to conserve endangered species[14] whose primary ranges[15] are in foreign lands.[16]

Defenders provided affidavits showing the existence of specific agency projects in foreign countries that increase, or threaten

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[10] Defenders of Wildlife v. Hodel, 658 F.Supp. 43, 45 (D. Minn. 1987).

[11] *Id.* at 46.

[12] Under section 4 of the Act (16 U.S.C. § 1533) and the regulations promulgated in accordance with that section, the Secretary determines whether any species is endangered or threatened. Once a species has been listed as an endangered or threatened species (section 1533(c)) or has been proposed to be listed (section 1536(a)(4)) the consultation provisions of section 7 become applicable . . . . Blum Note at 13 COLUM. J. ENVTL. L. 129, 130 n.13 and accompanying text.

[13] Defenders of Wildlife, Friends of Animals and Their Environment v. Hodel, 851 F.2d 1035, 1037-38 (8th Cir. 1988).

[14] Section 4(b)(1)(A) of the Act provides:

> The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or *foreign nation*, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.
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> (B) In carrying out this section, the Secretary shall give consideraton to species which have been-
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> (i) designated as requiring protection from unrestricted commerce by any *foreign nation*, or pursuant to any *international agreement*; or
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> (ii) identified as in danger of extinction, or likely to become so within the forseeable future, by any State agency or by any agency of a *foreign nation* that is responsible for the conservation of fish or wildlife or plants.

16 U.S.C. § 1533(b) (1988) (emphasis added).

[15] "[A]s of May, 1989, of 1,046 species listed as endangered or threatened, 507 were species whose range is outside the United States. In addition, there are 71 listed species whose range includes both United States and foreign territory. " Defenders of Wildlife, Friends of Animals and Their Environment, et. al. v. Lujan, 911 F.2d 117, 123 (8th Cir. 1990).

[16] *Defenders*, 851 F.2d at 1038.

to increase, the rate of species extinction.[17] These projects include the Mahaweli River Basin Project in Sri Lanka and the Aswan Dam Project in Egypt.[18] Defenders' members stated they had visited these projects in the past to observe and study the wildlife, and planned to visit these sites in the future to continue their studies.[19]

Eight endangered species are found in the Mahaweli Project area: the Indian elephant, the leopard, the purple-faced languar, the togue macaque, the red-faced malkoha, the Bengal monitor, the mugger crocodile, and the python.[20] Anne Skilbred, a member of Defenders, visited the Mahweli Project site in order to observe its wildlife and animal habitat, and stated she planned to revisit the site in the future for the same purposes.[21] Similarly, Joyce Kelly, President of Defenders, visited the Aswan Dam Project and planned to do so in the future.[22] The Bureau of Land Reclamation has a nine year commitment to aid in the rehabilitation of the Aswan High Dam, a site which is a habitat for the endangered Nile crocodile.[23] Defenders contended that without the required consultation, the adverse impacts of agency projects would not be given full consideration, thus injuring Defenders by threatening the very species they are studying.[24] Defenders sought declaratory and injunctive relief by requesting the court to direct the Secretary to perform the duties it owed to them; specifically, to publish, forthwith, regulations requiring federal agencies to consult on agency actions abroad that might affect endangered species.[25] The U.S. District Court for the District of Minnesota dismissed the case on the basis that Defenders lacked standing because it did not sufficiently allege an injury-in-fact, traceable to the Secretary's regulation and redressable by a favorable decision.[26]

On appeal the Eighth Circuit reversed and remanded, concluding that Defenders had sufficiently supported the standing requirements for both substantive and procedural injuries, by

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[17] *Defenders*, 658 F.Supp. at 47.
[18] *Defenders*, 911 F.2d at 120-21.
[19] *Id.*
[20] *Defenders*, 851 F.2d at 1041.
[21] *Defenders*, 911 F.2d at 120.
[22] *Id.*
[23] *Defenders*, 851 F.2d at 1041-42.
[24] *Id.* at 1041.
[25] *Id.*
[26] *Defenders*, 658 F.Supp. at 47-48.

alleging that the Secretary's interpretation of section 7 of the ESA increases the rate of extinction of the endangered and threatened species its members had visited at federal agency projects in foreign countries.[27]

On remand, the district court denied the Secretary's motion for summary judgment on the issue of standing. The court based its ruling on the fact that the Eighth Circuit's decision on this issue, in the Secretary's earlier motion to dismiss for lack of standing, did not vary the situation enough to merit a different analysis.[28] The court then entered summary judgment for Defenders and ordered the Secretary to rescind the 1986 regulation and issue regulations that would apply the consultation provisions of the ESA to federal agency action in foreign countries.[29] The court held the plain meaning of section 7 of the Act required each federal agency to consult with the Secretary regarding agency action that might affect any endangered or threatened species, including actions in foreign countries.[30] The Eighth Circuit Court of Appeals affirmed on both the standing issue and the extra-territorial issue, finding the extraterritorial requirement in the plain words of the statute. Accordingly, the court showed no deference to the Secretary's construction of the Act.[31]

The Supreme Court granted review to the Secretary's petition for Certiorari on May 14, 1990.[32] The issues slated for argument

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[27] *Defenders*, 851 F.2d at 1040.

[28] Defenders of Wildlife v. Hodel, 707 F.Supp. 1082, 1084 (D. Minn. 1989).

[29] *Id.* at 1086. The court ordered as follows:

> The Clerk shall enter the judgment as follows:
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> IT IS ORDERED, ADJUDGED AND DECREED that the Secretary of Interior shall:
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> 1. Revoke and rescind so much of 50 C.F.R. Part 402 (1987) as limits the consultation requirement of section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to federal agency action that may affect endangered or threatened species in the United States or on the high seas;
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> 2. Publish, within thirty (30) days . . . of this judgment, proposed regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found;
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> 3. Publish, within sixty (60) days . . . of this judgment, final regulations clearly recognizing the full mandate of section 7 of the Endangerd Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found.

[30] *Id.* at 1084.

[31] *Defenders*, 911 F.2d at 123-25.

[32] Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *cert. granted sub.*

before the Court on December 3, 1991 were: 1) Whether respondents, Defenders, have standing to challenge the regulation issued by the Secretary of the Interior which merely interprets the statutory obligations of federal agencies under Section 7(a)(2), when they have not challenged any specific action by an agency upon which the statutory obligations actually fall?; and 2) Is the Secretary's construction of Section 7(a)(2) of the Endangered Species Act as inapplicable to federal agencies/activities in foreign countries consistent with the Act?[33]

II. DO THE PLAINTIFFS HAVE STANDING?

A. *Previous Standing Decisions*

Standing for environmental plaintiffs has been generally and liberally allowed since the 1970s Supreme Court cases of *Sierra Club v. Morton*[34] and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.[35] These decisions set relatively inclusive standards, requiring only simple allegations that plaintiff organizations or their members use the land or resources affected by agency action.[36] In the 1990 case *Lujan v. National Wildlife Fed'n*, however, the Supreme Court narrowed *Morton*'s and *SCRAP'S* inclusive approach by requiring more specific pleading of substantive injury.[37]

In *Defenders*, the Eighth Circuit applied the *National Wildlife* guidelines and concluded that the plaintiffs' allegations were "specific enough" in light of this recent decision.[38] Additionally, *Defenders* also found standing for the plaintiffs' procedural injury claim by finding that the ESA itself conferred a correlative procedural right of consultation to the plaintiffs.[39]

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nom, Lujan v. Defenders of Wildlife, 59 U.S.L.W. 3763 (U.S. May 14, 1991) (No. 90-1424).

[33] 59 U.S.L.W. 3763, 3763-64 (U.S. May 14, 1991).

[34] Sierra Club v. Morton, 405 U.S. 727 (1972). *See* Defenders of Wildlife v. Hodel 851 F.2d 1035, 1040 (1988) (citing *Morton* as requiring plaintiff to allege that its members are those who use the environmental area, and who will be adversely affected).

[35] *SCRAP*, 412 U.S. 669, (1973). *See* Defenders of Wildlife v. Hodel 851 F.2d 1035, 1040 (1988) (citing *SCRAP* and *Morton*).

[36] Katherine B. Steuer and Robin L. Juni, Note, *Court Access for Environmental Plaintiffs: Standing Doctrine in Lujan v. National Wildlife Federation.*, 15 HARV. ENVTL. L. REV. 187, 194 (1991). [hereinafter Steuer and Juni, Note].

[37] ___ U.S. ___, 110 S. Ct. 3177 (1990).

[38] Defenders of Wildlife v. Lujan, 911 F.2d 117, 120-21 (8th Cir. 1990).

[39] *Id.* at 121-22.

The following sections on standing seek to show where the Eighth Circuit's treatment of substantive and procedural standing "fits" with these previous standing decisions, and discusses what the Supreme Court might consider in reviewing standing in *Defenders*.

B. Injury in Fact for Plaintiffs' Standing

Article III of the Constitution limits the power of the federal courts to actual "[c]ases [and] [c]ontroversies."[40] The Eighth Circuit's examination of the standing issue in *Defenders* was guided by the following fundamental principle:

> [A]t an irreducible minimum, Art[icle] III requires the party who invokes the court's authority to [1] "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 . . . (1979), and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 . . . (1976).[41]

In the first appeal, the Eighth Circuit found that Defenders had met the requirements for traceability (causation) and redressability.[42] The Secretary did not challenge these elements of standing on remand; and so the court did not address them in the second appeal.[43] The court also held when these requirements have been legislated into the statute itself by Congress, as was the case with the ESA,[44] plaintiffs will readily meet

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[40] U.S. CONST. art. III, § 2.

[41] *Defenders*, 911 F.2d at 119 (8th Cir. 1990) (quoting Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982)).

[42] *Defenders*, 851 F.2d at 1041-44.

[43] *Defenders*, 911 F.2d at 119.

[44] The purpose of the Endangered Species Act is to provide the means to conserve the ecosystems upon which endangered and threatened species depend. 16 U.S.C. § 1531 (1988).

Section 7(a)(2) is designed to meet that purpose by ensuring that the impact of a federal agency action on endangered or threatened species will be given full consideration. Section 7(a)(2) states that "[e]ach Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 [section 4 ESA] of this title . . . ." *Id.* at § 1536(a)(2). If this consultation requirement is not met, endangered species and hence

them.[45] Since these issues of standing are not of immediate focus in the upcoming Supreme Court's review, the focus here is on the injury-in-fact requirement for plaintiff standing.

The Eighth Circuit found Defenders sufficiently alleged injury in fact on two grounds: substantive and procedural.[46] Defenders' substantive injury was that governmental agencies' failure to consult with the Secretary about their projects' harmful effects on foreign species would result in an increase of the rate of extinction of endangered species in foreign countries.[47] That, in turn, would result in harm to its members who had visited those countries to observe those endangered species.[48] The procedural injury resulted from the Secretary's refusal to carry out the "statutorily mandated [consultation] procedure."[49] The body of law from which the *Defenders* court draws these conclusions includes the "backbone" cases of environmental plaintiff standing.[50] *Defenders* cuts a significant place among those prior cases.

1. *Substantive Injury in Fact*

Regarding the substantive injury, the Eighth Circuit assessed Defenders' standing status under the rules set forth in the "classic" standing cases of *Sierra Club v. Morton,*[51] *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),*[52] and the more recent Supreme Court case *Lujan v. National Wildlife Fed'n.*[53]

Regarding an organization like Defenders, the *Morton* court held that an injury or threatened injury to an interest in aes-

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plaintiff are threatened with harm (i.e., causation is inherent in the statute). Thus, Congress has determined that a remedy for Defenders' injury is consultation with the Secretary. A ruling that the 1986 regulations requiring consultation for agency projects in foreign countries will likely redress Defenders injury (i.e., redressability is established in the statute itself).

[45] *Defenders*, 851 F.2d at 1043.

[46] *Defenders*, 911 F.2d at 119.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See* Steuer and Juni, Note, *supra*, note 36, at 194.

[51] Sierra Club v. Morton, 405 U.S. 727 (1972). *See* Defenders of Wildlife v. Hodel 851 F.2d 1035, 1040 (1988) (citing *Morton* as delineating the requirements for standing).

[52] U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, (1973). *See* Defenders of Wildlife v. Hodel 851 F.2d 1035, 1040 (1988) (citing SCRAP as the basis for standing).

[53] Lujan v. National Wildlife Federation, ____ U.S. ____, 110 S. Ct. 3177 (1990).

thetic, conservational, and recreational values is considered a substantive injury-in-fact sufficient to support standing, provided the plaintiff organization alleges that its members use the area and will be adversely affected.[54] In *Morton*, the Sierra Club was challenging Walt Disney's plans to develop the Mineral King Valley in the Sierra Nevada Mountains. The Court denied standing to the Sierra Club finding that the organization failed to assert that its members used the Mineral King Valley, thus they were not materially injured by any change in the aesthetics and ecology of the area.[55]

The Sierra Club had deliberately omitted from its complaint any allegation that its members had been injured in fact, because they sought a way to challenge environmental degradation wherever it might occur.[56] The Supreme Court found this goal of environmental action far too policy-oriented and directly contrary to the traditional injury indicia of Constitutional standing.[57] In fact, the Court stated "[n]owhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents."[58]

In *SCRAP*,[59] plaintiffs challenged the approval of railroad freight rate increases, claiming such increases would discourage the shipment of recycled goods, thereby increasing the use and waste of natural resources.[60] The Court held SCRAP had standing because its "members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities."[61] SCRAP applied the *Morton* analysis to find "that the plaintiffs had asserted the 'specific and percepti-

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[54] *Morton*, 405 U.S. at 734-35.

[55] *Id.* at 734

[56] *See Morton*, 405 U.S. at 735-36, n. 8; and at 740, n. 15. *See also* Steuer and Juni, Note, at 193 n. 37 (quoting L. TRIBE, AMERICAN CONSTITUIONAL LAW § 3-16, 117-18 (2d. ed. 1988)).

[57] Steuer and Juni, Note, at 193 n. 37.

[58] *Morton*, 405 U.S. at 735.

[59] *SCRAP*, 412 U.S. 669 (1973).

[60] Steuer and Juni, Note, at 193.

[61] *SCRAP*, 412 U.S. at 685, *quoted in* Steuer and Juni, Note, at 193.

ble' harm necessary to distinguish their interests from a generalized interest in natural resources . . . as a whole."[62]

While *Morton* and *SCRAP* set the stage for environmental plaintiff standing, they espouse relatively inclusive standards, requiring only simple allegations that plaintiff organizations or their members use the land or resources affected by agency action.[63] Indeed, the *SCRAP* Court observed that "all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here."[64] In 1990, the Supreme Court retreated from these liberal standing rules.[65]

Lujan v. National Wildlife Fed'n narrowed the standards of *Morton* and *SCRAP* by requiring specific allegations of harm.[66] *National Wildlife* involved a challenge by the National Wildlife Federation (NWF) of the "land withdrawal review program" of the Bureau of Land Management (BLM).[67] The NWF alleged that the director of the BLM had violated the Federal Land Policy and Management Act (FLPMA)[68] and the National Environmental Policy Act (NEPA),[69] through its administration of the "land withdrawal review program."[70] The NWF provided affidavits claiming use of land "in the vicinity" of vast tracts of land affected by the BLM's decisions regarding classifications and revocations of withdrawals.[71] The Court held these affidavits

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[62] *Id.* at 689, *quoted in* Steuer and Juni, Note, at 193.

[63] *Supra* note 47m at 194.

[64] *SCRAP*, 412 U.S. at 687, *quoted in* Steuer and Juni, Note, at 193.

[65] Steuer and Juni, Note, at 194. (referring to Lujan v. National Wildlife Fed'n., ___ U.S. ___, 110 S. Ct. 3177 (1990)).

[66] National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987), *reh'g denied*, 844 F.2d 889 (D.C. Cir., *on remand*, 699 F. Supp. 327 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted sub nom.*, Lujan v. National Wildlife Fed'n, 110 S. Ct. 834, *rev'd*, 110 S. Ct. 3177, 3189 (1990)(hereinafter Lujan v. NWF).

[67] *Id.* at 3182.

[68] Federal Land Policy and Management Act [hereinafter cited as FlPMA], Pub. L. no. 94-579, 90 Stat. 2744 (1976) (codified in provisions scattered through U.S.C. Titles 7, 16, 30, 40, and 43 (1988)).

[69] National Environmental Policy Act [hereinafter cited as NEPA], Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1988)).

[70] *Id.* at 3183-84.

[71] According to Lujan v. NWF, plaintiff Peterson's affidavit averred:

> My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Moun-

were insufficient to confer standing because it remained unclear whether plaintiffs actually used the lands or resources adversely affected by the BLM's "land withdrawal review program."[72]

The Eighth Circuit distinguished the allegations in *Defenders* from the insufficient ones in *National Wildlife*:

> In *National Wildlife*, the Supreme Court held that the allegations in the Peterson affidavit claiming use of the land "in the vicinity of South Pass-Green Mountain, Wyoming," were insufficient to defeat summary judgment on standing. This claim was not specific enough because only 4500 acres of the two million acre area were affected by the challenged action. The Erman affidavit was similarly deficient because it claimed use of land "in the vicinity" of the Grand Canyon, Arizona Strip, and the Kaibib National Forest. Of the 5.5 million acres of the Arizona Strip, only one-third were actually affected by the challenged action. . . . [T]he evidence here [in *Defenders*] specifically identified the land areas visited which were the sites of the challenged agency actions. [Plaintiff] Skilbred stated that she visited the Mahaweli Project site in Sri Lanka . . . . [Plaintiff] Kelly stated that she had observed the traditional habitat of the Nile crocodile at the Aswan High Dam project in Egypt.[73]

In *Defenders*, the Eighth Circuit followed the Supreme Court's retreat from the inclusive standards of *Morton* and *SCRAP* by applying the mandate of *National Wildlife* in closely scrutinizing the specific allegations in deciding whether the interests of the plaintiffs were "actually affected."[74] The upcoming Supreme Court review of *Defenders* should reveal whether De-

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> tain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands.

National Wildlife Fed'n, 110 S. Ct. at 3187.

> Plaintiff Erman's affidavit was substantially the same as Peterson's except in regard to the area involved; he claimed use of land 'in the vicinity of Grand Canyon National Part [sic], the Arizona Strip (Kanab Plateau), and the Kaibab National Forest.'

Id.

[72] *Id.* at 3189.

[73] 911 F.2nd at 121 n.2 (citations omitted).

[74] Steuer and Juni, Note, at 205.

fenders' allegations were specific enough. The ultimate result will be either a halting of the *National Wildlife* Court's narrowing of standing requirements, by granting Defenders standing, or, a requirement of even greater specificity for environmental plaintiffs' pleading, by denying Defenders standing.

1. *Procedural Injury*

As for their procedural injury, Defenders alleged the Secretary's refusal to carry out a statutorily mandated consultation procedure constituted sufficient injury-in-fact to confer standing.[75] The Secretary's failure to follow the consultation procedure created a risk that serious agency actions would not be brought to the attention of the decision makers.[76] Defenders was injured because the Secretary ignored a procedural requirement central to implementing the purposes of the ESA.[77]

In the first *Defenders* appeal, the Eighth Circuit noted various courts of appeals had held that agency violations of procedural rights constituted injury-in-fact.[78] In determining whether a given statutory duty created a correlating procedural right, the court in the second appeal looked to the statutory language, purpose, and legislative history of the ESA and found sufficient support for procedural injury standing.[79]

In examining these statutory categories, the court found the language of the citizen suit provision of the ESA,[80] the Act's enunciated purposes,[81] and past Supreme Court interpretations

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[75] 851 F.2d at 1040.

[76] *Id.* at 1042.

[77] *Id.*

[78] *Id. See* Trustees for Alaska v. Hodel, 806 F.2d 1378 (9th Cir. 1986) (environmental groups had standing to challenge Department of Interior's alleged violation of NEPA provision requiring public input on oil and gas exploration recommendations report when failure to do so would result in overlooking of environmental concerns in agency decision); Oregon Environmental Council v. Kunzman, 817 F.2d 484, 491 (9th Cir. 1987) (procedural defects in environmental impact statement (EIS) preparation create risk that environmental impacts will be overlooked and constitute injury in fact); Munoz-Mendoza v. Pierce, 711 F.2d 421, 428 (1st Cir. 1983) (failure to make allegedly mandatory study is procedural error).

[79] 911 F.2d at 121-22. *See* Fernandez v. Brock, 840 F.2d 622, 630 (9th Cir. 1988) (In determining whether a given statutory duty creates a correlating procedural right, courts look to the statutory language, purpose and legislative history.).

[80] *See* 16 U.S.C. § 1531 (1988).

[81] The purpose of the Endangered Species Act is to provide the means to conserve the ecosystems upon which endangered and threatened species depend. 16 U.S.C. § 1531(b) (1988). Section 7(a)(2) is designed to meet that purpose by ensuring that the impact of

of the Act's legislative history,[82] as supportive of Defenders' standing for procedural injury.[83] According to the *Defenders* court, the 1986 regulation violated the language and intent of the ESA and therefore injured Defenders because it allowed agency actions in foreign countries to proceed without the requisite consultation with the Secretary of the Interior.[84] The lack of consultation impeded the very objectives of the ESA; and failure to follow the consultation procedure created a risk that serious and avoidable environmental consequences of agency actions would not be brought to the attention of the decision makers.[85] According to the court, Defenders was "procedurally" injured by elimination of the consultation procedures through the 1986 regulation.[86]

While the *Defenders* court focused on the statute as the source of procedural injury, another circuit required a different standard for procedural injury standing. The Eighth Circuit refers to *City of Davis v. Coleman*, in which the Ninth Circuit specifically required a "geographical nexus" test in addition to a statutory procedural right for plaintiffs to obtain procedural injury standing.[87] In *Coleman*, the court granted standing to the City of Davis when it asserted procedural injuries resulting from the failure of federal and state agencies to prepare an Environmental Impact Statement (EIS), as required under NEPA, before commencing construction of a freeway interchange near Davis.[88] The court stated:

> The procedural injury implicit in agency failure to prepare an EIS . . . is itself a sufficient "injury in fact" to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged

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a federal agency action on endangered or threatened species will be given full consideration. Section 7(a)(2) states that "[e]ach Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 [section 4 ESA] of this title . . . ." *Id.* at § 1536(a)(4).

[82] "[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'" Tennessee Valley Auth. v. Hill, 437 U.S. 153, 187 (1978).

[83] 911 F.2d at 121-22.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] 911 F.2d at 121 (citing City of Davis v. Coleman, 521 F.2d 661 (9th Cir. 1975)).

[88] Coleman, 521 F.2d at 665-66.

project that he may be expected to suffer whatever environmental consequences the project may have.[89]

The *Defenders* court rejected the Secretary's contention that plaintiffs are required to establish a geographical nexus to the project sites in order to establish a procedural injury.[90] The Eighth Circuit was persuaded that geographical nexus did not establish procedural injury, rather the Act imposes duties on the Secretary that create the correlative procedural rights. Invasion of those procedural rights is sufficient to satisfy the injury-in-fact requirement for standing.[91] In reviewing *Defenders* the Supreme Court should have an opportunity to indicate whether it wants to focus strictly on the statutory sources of procedural injuries, or to retain and clarify the geographical nexus test.

C. *Summary for Plaintiff Standing*

The *Defenders* plaintiffs alleged both substantive and procedural injuries. The substantive injury was that plaintiffs sustained harm by the potential increased rate of extinction of the endangered species that they studied in foreign lands; such injury resulted from the Secretary's 1986 elimination of the consultation requirement for federal agencies conducting projects in foreign lands. The procedural injury resulted from the Secretary's refusal to carry out the statutorily mandated consultation procedure to ensure adverse affects on endangered and threatened species abroad would not be ignored.

Concerning substantive injury for standing, the *Defenders* court found the plaintiffs alleged, specifically enough, facts regarding "actual effects" of the project sites where endangered species will be potentially threatened; plaintiff's therefore demonstrated sufficient injury for standing. The court's finding comports with the recent Supreme Court framework set forth in *National Wildlife*, which reflected a narrowing in the allowance of standing to environmental plaintiffs compared to the broad and inclusive standards in the *Morton* and *SCRAP* decisions.

The *Defenders* court specifically focused on statutory language and intent as the source of a correlative procedural right, the infringement of which would be sufficient to confer standing upon the plaintiff. In doing so, the Eighth Circuit discarded the "geographical nexus" test.

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[89] *Id.* at 671.
[90] 911 F.2d at 121.
[91] *Id.*

III. EXTRATERRITORIALITY OF THE ENDANGERED SPECIES ACT

The Eighth Circuit's finding of extraterritorial application for the ESA[92] in the language of the statute itself is a rare occurrence for environmental statutes.[93] Courts have consistently applied a presumption *against* extraterritoriality for environmental statutes in absence of a clearly expressed statement of congressional intent to the contrary.[94] The *Defenders* court found sufficient proof in the language of the statute to rebut this presumption, and decided section 7 of the ESA applied extraterritorially.[95]

A. Statutory Analysis

The Eighth Circuit found congressional intent for extraterritorial application of the ESA in section 7 by applying the definitive two-part test of *Chevron v. NRDC*:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions[:]
>
> [1] First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . .
>
> [2] [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[96]

Focusing on the text of section 7(a)(2) itself, the *Defenders* court found:

> Reduced to its simplest form, the statute clearly states that *each* federal agency must consult with the Secretary regarding *any* action to insure that such action is not likely to jeopardize the existence of *any* endangered species.[97]

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[92] Endangered Species Act of 1973 [hereinafter cited as ESA], *as amended*, 16 U.S.C. §§ 1531-1543 (1988).

[93] *See* Jonathan Turley, *"When In Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 N.W. LAW REV. 598, 627 (1990).

[94] *Id.* at 602.

[95] 911 F.2d at 125.

[96] 911 F.2d at 122. (citing Chevron U.S.A., v. Natural Resources Def. Council, 467 U.S. 837, 842-43 (1984)).

[97] *Id.*

The court acknowledged that focusing on the all-inclusive language of section 7, however, was not itself "determinative of the issue."[98] The court examined other sections of the ESA. It concluded that the plain language of the Act revealed congressional intent to extend the consultation requirement to all agency actions affecting endangered species, whether within the United States or abroad; therefore, no deference to agency interpretation was mandated.[99] For the court, the legislative history reinforced this conclusion.[100] Since the Secretary's 1986 regulation was contrary to the specific intent of Congress, no deference was due to the agency's construction of section 7 under application of the *Chevron* rule, and the district court's order for reversal of the regulation was affirmed on this basis.[101]

8. Extraterritoriality in Other Environmental Statutes.

A court's finding of support for extraterritorial application of an environmental statute in the language of the statute itself is rare.[102] Courts consistently deny extraterritorial application as inherent in environmental statutes.[103] In *United States v. Mitchell*, for example, the court held criminal prohibitions of the Marine Mammal Protection Act (MMPA)[104] did not reach conduct in the territorial waters of a foreign nation.[105] The court found that the MMPA was "a conservation statute, designed to preserve marine mammals."[106] In *Mitchell*, the defendant was charged with violating the MMPA by capturing twenty-one dolphins within a three-mile limit of the Commonwealth of the Bahamas. Although Congress has the power to control the conduct of American citizens in foreign countries, the court stated such an intent for extraterritorial application must come from the statute itself.[107] Applying precisely the same reasoning, the *Defenders* court *did* find that the ESA mandates extraterritorial

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[98] *Id. See* United States v. Mitchell, 553 F.2d 996, 1003-04 (5th Cir. 1977).

[99] 911 F.2d at 125

[100] *Id.*

[101] *Id.*

[102] *See supra* notes 87-8 and accompanying text.

[103] *Id.*

[104] Marine Mammal Protection Act [hereinafter cited as MMPA], Pub. L. No. 92-522, 86 Stat. 1027 (1972) (codified in praovisions scattered in U.S.C. Title 16 (1988)).

[105] United States v. Mitchell, 553 F.2d 996, 997 (5th Cir. 1977).

[106] *Id.* at 1002.

[107] *Id.* at 1001-02.

application,[108] and seems to run counter to many courts' reluctance to find intent for extraterritoriality. The *Defenders* court indicated that under appropriate statutory language and circumstances, the presumption might be overcome.

The *Defenders* court's finding of congressional intent, and statutory language and history sufficient to support a finding of foreign applicabilty, is not wholly inconsistent with other cases that have *limited* NEPA to a domestic scope only.[109] NEPA and the ESA are similar in that both are procedural statutes which impose duties upon federal agencies to consider the environmental effects of their actions. As in section 7 of the ESA, the mandate on federal agencies in NEPA is also all-inclusive: All agencies of the federal government shall prepare an environmental impact statement (EIS) for major federal actions affecting the quality of the human environment.[110] In order to gain insight into the impact of the Eighth Circuit's extraterritorial applicability holding in *Defenders*, the extraterritorial application of the consultation requirement of the ESA might be compared to NEPA procedures as they have been considered in the courts.

In *Greenpeace v. Stone*, a second case, the plaintiff organization challenged the Army's failure to prepare an EIS for the removal of chemical munitions from Germany to United States territory.[111] The removal was based on a Presidential agreement between the United States and West Germany.[112] The extraterritorial application of NEPA, was denied finding that application to actions in foreign countries would gravely conflict with foreign policy objectives, since the West German government had reviewed and approved the removal.[113] The court pointed out, however, that its "decision [was] limited to the specific and unique facts which [were] present[ed]. . . . In other circumstances, NEPA may require a federal agency to prepare an EIS for actions taken abroad . . . ."[114]

Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commn. questioned whether NEPA should be applied to

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[108] 911 F.2d at 122-23.

[109] *See* Greenpeace v. Stone, 748 F.Supp. 749, 758-59 (D. Hawaii 1990); Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission, 647 F.2d 1345, 1365-68 (D.C. Cir. 1981).

[110] 42 U.S.C. § 4332 (C) (1988).

[111] *Greenpeace*, 748 F.Supp. at 754.

[112] *Id.* at 749.

[113] *Id.* at 761.

[114] *Id.*

the NRC's granting of a permit to export a nuclear reactor to the Phillipines.[115] Plaintiffs argued that NEPA required the commission to prepare an EIS before licensing exportation of the reactor.[116] Although the challenged agency action in this case would have a possible indirect effect upon the Phillipines, the court held against the application of NEPA because of the foreign nation's interest at stake.[117] As in *Greenpeace*, the *NRDC* court was careful to comment that "[we] find only that NEPA does not apply to NRC nuclear export licensing decisions - and not necessarily that the EIS requirement is inapplicable to some other kind of major federal action abroad."[118]

Both *Greenpeace* and *NRDC* deny extraterritorial application of NEPA in their particular circumstances, but limit this to the facts, and thus leave open *some* fact situations where NEPA may be applied extraterritorially.[119]

Regarding NEPA, while the courts have been unable to find clear legislative intent, they have generally assumed NEPA does apply extraterritorially.[120] Additionally, once plaintiffs establish NEPA applies on one ground, some courts have found them entitled to raise other inadequacies in the agencies EIS based upon public interest. This inference has led courts to assume NEPA applies extraterritorially for the specific foreign environmental impacts involved.[121]

Compared to the NEPA decisions, *Defenders* is unique because extraterritorial application is found not from the circumstances or outcome of the case alone, but in the actual intent and language of the environmental statute itself. In comparison

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[115] Natural Resource Defense Fund, Inc. v. Nuclear Regulatory Commission, 647 F.2d 1345, 1351 (D.C. Cir. 1980).

[116] *Id.* at 1355.

[117] *Id.* at 1357.

[118] *Id.* at 1366.

[119] *See* Joan R. Goldfarb, *Extraterritorial Compliance With NEPA Amid the Current Wave of Environmental Alarm*, 18 B.C. ENVTL. AFF. L. REV. 543 (1991) for detailed discussion of extraterritorial application of NEPA.

[120] *Id.* at 564.

[121] *See* Sierra Club v. Adams, 578 F.2d 389, 391-2 n.14 (D.C. Cir. 1978) (In action to enjoin United States participation of highway construction in Panama due to alleged deficiencies in the Final Environmental Impact Statement, the court acknowledged that the effect of construction on local Indians raised the question of the foreign applicability of NEPA, and parties submitted briefs on the question. Since the government did adequately discuss the impact of construction on the Indians, however, the court merely assumed, without deciding, that NEPA is fully applicable to construction in Panama, leaving resolution of "this important issue" to another day.).

to past court interpretations, *Defenders* stands out as a victory for environmentalists. The *Defenders* court found, within a statute, protection for the global environment. This reaches beyond the traditionally review-shielded regulatory actions of agency officials, usually accorded great deference.

IV. CONCLUSION

Lujan v. Defenders of Wildlife may become a definitive case for environmental plaintiff standing. If affirmed on the standing issue, it will serve as an example of the greater specificity in pleading necessary to allege substantive injury. *Morton* remains just above the bare minimum baseline requirements of *SCRAP*, as far as environmental standing is concerned. Under *Morton*, plaintiffs cannot bring suit without at least a threat of injury; whereas *SCRAP* finds injury can be alleged from a tenuous chain of causation. Since the recent *National Wildlife* decision heightens the scrutiny for injury, *Defenders* will either stand as an example of this recent refinement of the required specific pleading of "actual affect" and injury through plaintiffs' use of the land and resources (species) affected; or it will fall as non-specific allegations insufficient in the eyes of the Supreme Court.

If the procedural injury standing is affirmed, more pressure may be placed on federal agencies to promulgate regulations tracking more closely the statutory language involved—a definite boon to environmentalists. The Eighth Circuit rejected the geographical nexus element of procedural injury standing, focusing solely on the statutory source of the procedural injury. This could damage environmental plaintiffs if, despite a geographical nexus to the agency action, the statute could defeat a procedural injury, where the statute does not sufficiently establish a correlative procedural right. The Supreme Court should take the opportunity to indicate whether it wants to focus strictly on the statutory sources of procedural injuries, or to retain and clarify the geographical nexus test.

The Eighth Circuit has decided the *Defenders* case against an agency decision. By finding extraterritorial application in the ESA itself, the court foreclosed the application of step two under a *Chevron* review of an agency's statutory construction. Such a finding is rare for an environmental statute, and stands to be a victory for endangered species and for the environment if upheld by the Supreme Court; the protection will be etched into the

statute itself rather than left at the mercy of agency interpretation. Finally, since environmental dangers are themselves blind to national boundaries, *Lujan v. Defenders of Wildlife* could be a step in the right direction toward a more global application of our environmental statutes.

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